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No. 04-1140

In The Supreme Court of the United States

GERALD T. and JUANA M. MARTIN, on behalf of themselves and all others similarly situated,

Petitioners,

v.

FRANKLIN CAPITAL CORPORATION, a Utah corporation, and CENTURY-NATIONAL INSURANCE COMPANY, a California corporation,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION FOR REVIEW

What legal standard governs the decision whether to award fees upon remanding a removed case to state court?

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RESPONDENTS' BRIEF ON THE MERITS

Respondents Franklin Capital Corporation and Century-National Insurance Company respectfully submit that the judgment below should be affirmed for the following reasons.

STATEMENT OF THE CASE

In 1996 Plaintiffs filed this class action in New Mexico state court, alleging they had been overcharged for collateral protection insurance after they failed to maintain their own insurance on the cars they had purchased on credit. JA 9-10. Plaintiffs sought to void the credit sale contracts for their cars and to recover actual and treble damages, punitive damages, and attorney fees. JA 27, 29, 31.

Defendants timely removed the case to district court based on diversity jurisdiction. JA 1, 34. Plaintiffs did not file a remand motion. JA 1-2. Instead, they litigated the case on the merits in federal court, opposing Century-National's motion to dismiss, taking discovery, and ultimately moving for class certification. *Id.*

More than a year after removal, plaintiffs first raised a "concern" about jurisdiction at oral argument on the motion to dismiss after the district court indicated it might grant the motion. Plaintiffs' counsel acknowledged that at the time of removal, he thought the case fell within the federal courts' diversity jurisdiction and consciously chose not to contest jurisdiction. JA 38. But, he said, an affidavit submitted in opposition to plaintiffs' class certification motion revealed plaintiffs had not paid for collateral

protection insurance, thus triggering his new concern that the amount in controversy was not met. JA 39; *cf. Laughlin v. Kmart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995) (amount in controversy must be established on the face of the complaint or the removal notice, not by later-filed documents).

The district court reserved its ruling on the motion to dismiss and invited plaintiffs to file a motion attacking jurisdiction. JA 40. Sixteen months after removal, plaintiffs filed such a motion, attacking only the amount in controversy. JA 2 item #38.

Defendants filed opposition contending the amount in controversy requirement was satisfied in three independent ways: (1) the named plaintiffs individually sought relief worth more than $50,000, and the district court could exercise supplemental jurisdiction over class members' claims pursuant to 28 U.S.C. § 1367 even if they claimed less than $50,000; (2) the class' punitive damages claims could be aggregated and exceeded $50,000; and (3) the class' claim for attorney fees could be aggregated and exceeded $50,000. JA 2, items #39, 40.

The district court denied plaintiffs' remand motion, finding that plaintiffs individually stated colorable claims for an amount that was not certainly less than $50,000. JA 4, item #52, 42-43. The district court denied plaintiffs' later request that it certify that ruling for interlocutory appeal under 28 U.S.C. § 1292(b), stating: "[m]y exercise of subject matter jurisdiction on the remand issue was properly based upon these considerations of the [complaint's] allegations as of the time of removal. I conclude there is no substantial ground for difference of opinion on this issue." JA 48.

The district court also denied plaintiffs' class certification motion and granted Century-National's motion to dismiss. JA 3-4, items #50-51. At plaintiffs' request, the district court entered judgment dismissing the complaint with prejudice so plaintiffs could immediately appeal the jurisdictional issue. JA 4, item #61.

The Court of Appeals held that defendants had not proven by a preponderance of the evidence, based solely on the complaint and notice of removal, that plaintiffs individually sought more than $50,000.[1] *Martin v. Franklin Capital Corp.*, 251 F.3d 1284, 1290-91 (10th Cir. 2001); JA 59-60. It also ruled, as a matter of first impression in that circuit, that neither punitive damages nor attorney fees could be aggregated in a class action to reach the amount in controversy. *Id.* at 1292-93; JA 61-64. The Court of Appeals reversed the judgment and remanded the case to the district court, directing that it remand the case to state court. JA 65.

Plaintiffs then moved for an award of attorney fees and expenses under 28 U.S.C. § 1447(c). JA 5, item #68. The district court denied the motion. It noted that it had discretion to award fees even though no bad faith was shown. Pet. 16a. It should award fees, it said, if it found that the removal was not proper or legitimate – a standard "much different than colorable" – under legal authority

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[1] The Court of Appeals also pointed out that *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 638-41 (10th Cir. 1998) – issued after judgment was entered in this case – held that despite 28 U.S.C. § 1367 each class member individually had to meet the amount in controversy requirement. *Martin*, 251 F.3d at 1294; JA 64. *Leonhardt* was wrong, however, as this Court held last term. *Exxon Mobil Corp. v. Allapattah Serv., Inc.*, 545 U.S. ___, 125 S.Ct. 2611, 2625 (2005).

extant at the time of removal. *Id.* Aggregation of punitive damages and attorneys fees, the district court concluded, were theories supported by legal authority at the time of removal; hence, the removal was proper. Pet. 17a-19a. Summing up, the district court said:

> . . . I conclude that in October 1996, Defendants had legitimate grounds for believing this case fell within this Court's jurisdiction. I believe that Defendants had objectively reasonable grounds to believe the removal was legally proper. In reaching this conclusion, I have taken into account the complexity and uncertainty of the law in this area. . . . . Under the circumstances set forth in this decision, I conclude that it is not appropriate to award fees . . . .

Pet. 20a.

Plaintiffs appealed denial of the fee motion, and the Court of Appeals affirmed. It held that the district court had applied the appropriate legal standard in deciding the motion. Pet. 4a-7a. It also agreed with the district court "that at the time defendants removed this action to federal court on the basis of aggregating punitive damages, they 'had objectively reasonable grounds to believe the removal was legally proper.'" Pet. 7a-8a. "Given the uncertain state of the law on aggregation of punitive damages," said the Court of Appeals, "we cannot say the district court abused its discretion in declining to award fees to [plaintiffs]." Pet. 13a.

SUMMARY OF ARGUMENT

The issue here is one of statutory interpretation. What does the third sentence of 28 U.S.C. § 1447(c) mean? And how did Congress intend it to be applied?

The sentence's text is short and unsupportive of petitioners' proposal that fees should be awarded virtually automatically upon remand. The statute states that a remand order "may require" payment of "just" costs and any actual expenses, including attorney fees. Nothing in the text suggests a near-mandatory fee award standard; both "may" and "just" point in the opposite direction.

The provision's history, too, contradicts petitioners' submission. Both the immediate circumstances of the 1988 amendment that gave the sentence its current form, and the broader history of the statute's predecessors, show that § 1447(c)'s third sentence is not a cost- or fee-shifting statute at all. Instead, the sentence is a grant of jurisdiction or power only, reversing a common law rule under which a court could enter no monetary award when it lacked subject matter jurisdiction.

Neither the third sentence nor the rest of § 1447(c) specifies when or how the power it grants may be exercised; other provisions of federal law do so. 28 U.S.C. § 1920, Fed. R. Civ. P. 54(d)(1), and the case law interpreting them determine when a remand order may require payment of costs. Similarly, attorney fees and other nontaxable expenses may be awarded on remand only when allowed by other law, such as Fed. R. Civ. P. 11, or when permissible under a recognized exception to the American Rule, such as the bad faith, vexatious litigant exception.

Even if viewed as a fee-shifting statute, § 1447(c)'s third sentence should not be governed by a categorical rule, such as petitioners propose, requiring attorney fee awards except in extraordinary circumstances. None of the factors that led the Court to adopt categorical rules regarding fee awards in civil rights cases is present here.

Neither § 1447(c)'s statutory language nor its legislative history support a categorical rule. The "large objectives" of the pertinent statutes and the "equitable circumstances" of the parties weigh against adopting any categorical rule. The statutes generally governing federal jurisdiction and removal, and § 1447(c) in particular, were not enacted to discourage removal, reduce federal caseloads, or avoid litigation of jurisdictional issues. State court plaintiffs are not "the chosen instrument of Congress." Typically, they do not vindicate any federal policy, least of all one "that Congress considered of the highest priority." *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418 (1978). A defendant who unsuccessfully removes is not a violator of federal law. *See Independent Fed. of Flight Attendants v. Zipes*, 491 U.S. 754, 762-63 (1989).

If treated as a fee-shifting statute, § 1447(c)'s third sentence should be read, as the statute interpreted in *Fogerty v. Fantasy, Inc.*, 510 U.S. 517 (1994), to require a multi-factor analysis, turning principally on the reasonableness of the removal.

Any proper interpretation of § 1447(c) will lead the Court to affirm the judgment. If the section is a jurisdictional grant only, fees were properly denied as no exception to the American Rule permits a fee award in this case. If the section is a fee-shifting statute, the district court did not abuse its discretion. The removal was reasonable and

other pertinent factors support the district court's denial of fees.

ARGUMENT

I. As Its History Shows, § 1447(c)'s Third Sentence Is Not A Fee-Shifting Statute, But Empowers District Courts To Award Fees And Costs Only When Allowed By Other Law

A. Section 1447(c)'s Predecessors Carved An Exception To The General Rule Barring Any Monetary Award When A Court Lacked Subject Matter Jurisdiction

Section 1447(c)'s third sentence is the latest version of a statute originally enacted in 1875 to empower federal courts to award costs on dismissal or remand for lack of subject matter jurisdiction. Neither § 1447(c) nor its predecessors ever stated a standard for awarding costs or fees, leaving that matter to other provisions of federal law.

Nearly from their creation, the federal courts followed the common law rule that a court without subject matter jurisdiction lacks the power to award costs or fees. "If there were no jurisdiction, there was no power to do anything but to strike the case from the docket."[2] Hence, "in all cases where the cause is dismissed [or remanded] for want of jurisdiction, no costs are allowed."[3]

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[2] *Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 250 (1867).

[3] *McIver v. Wattles*, 22 U.S. (9 Wheat.) 650 (1824); *accord Smyth v. Asphalt Belt Ry. Co.*, 267 U.S. 326, 330 (1925); *Citizens' Bank v. Cannon*, 164 U.S. 319, 324 (1896); *Hornthall v. Internal Revenue*

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In 1875, Congress enacted a large exception to this common law rule. Act of March 3, 1875, 18 Stat. 470. Section 3 ("§ 3") of the 1875 act required, for the first time, that a removing defendant post a bond "for paying all costs . . . awarded . . . if . . . such suit was wrongfully or improperly removed. . . ." 18 Stat. 471. Section 5 ("§ 5") of the same act further provided that "if, in any suit commenced in a circuit court or removed from a State court to a circuit court," the circuit court found it lacked subject matter jurisdiction, "the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it . . . , *and shall make such order as to costs as shall be just*." 18 Stat. 472 (italics added).

"[M]anifestly designed to avoid the application of the general rule, which, in cases where the suit failed for want of jurisdiction, denied the authority of the court to award judgment against the losing party, even for costs," these two sections for the first time conferred on federal courts the power to award costs in cases dismissed or remanded for want of subject matter jurisdiction.[4]

Over the following 75 years, the substance of §§ 3 and 5 was carried forward, with only minor amendment, in subsequent legislation affecting federal jurisdiction and removal. *See In re Northern Indiana Oil Co.*, 192 F.2d 139, 141-42 (7th Cir. 1951) (recounting subsequent history of

Collector, 76 U.S. 560, 567 (1869); *Montalet v. Murray*, 8 U.S. (4 Cranch) 46, 47 (1807).

[4] *Mansfield, C. & L. M. Ry. Co. v. Swan*, 111 U.S. 379, 387 (1884); *see id.* at 386 ("no want of power" to award judgment for costs); *Citizens for a Better Environment v. Steel Co.*, 230 F.3d 923, 926 (7th Cir. 2000) ("power conferred on circuit courts by Act of March 3, 1875 . . . to award costs . . . when remanding a suit").

§ 5). Ultimately, § 3 was recodified as 28 U.S.C. § 1446(d),[5] while § 5 was split into two sections: 28 U.S.C. § 1919, governing dismissal of actions originally filed in federal court, and 28 U.S.C. § 1447(c), governing remand to state court of removed actions.[6] In areas unaffected by these statutes, however, the common law rule retained its former vitality.[7]

Early decisions awarded costs under § 5, as a matter of course, against the party unsuccessfully invoking federal jurisdiction,[8] apparently following the common law

[5] Before its repeal in 1988, 28 U.S.C. §1446(d) provided: "Each petition for removal of a civil action or proceeding . . . shall be accompanied by a bond . . . conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

[6] Before its amendment in 1988, 28 U.S.C. §1447(c) provided, in relevant part: "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, *and may order the payment of just costs*." (Emphasis added.) Though omitted from the 1948 Judicial Code, 62 Stat. 869, 939, § 1447(e), the phrase "and may order the payment of just costs" was reinserted a year later, 63 Stat. 89, 102, § 84, the House Report noting that "[t]his section also amends renumbered subsection (c) to remove any doubt that the former law authorizing the district court upon remand to order payment of costs is continued." H.R. REP. No. 81-352 (1949), *reprinted in* 1949 U.S.C.C.A.N. 1248, 1268.

[7] *See, e.g., Branson v. Nott*, 62 F.3d 287, 293 (9th Cir. 1995); *Correspondent Serv. Corp. v. JVW Inv., Ltd.*, 2004 WL 2181087 at *14-16 (S.D.N.Y. 2004).

[8] *E.g., Neel v. Pennsylvania*, 157 U.S. 153, 154 (1895); *Tennessee v. Union & Planters' Bank*, 152 U.S. 454, 464 (1894); *Cates v. Allen*, 149 U.S. 451, 461 (1893); *Martin v. Snyder*, 148 U.S. 663, 664 (1893); *Torrence v. Shedd*, 144 U.S. 527, 533 (1892); *Graves v. Corbin*, 132 U.S. 571, 590 (1890); *see also American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 19 (1951).

rule automatically assessing costs against a losing party.[9] After the Federal Rules were adopted in 1938, merging law and equity and providing for the allowance of costs "as of course to the prevailing party unless the court otherwise directs," Fed. R. Civ. P. 54(d)(1), courts held that an award of costs on remand under § 5's successors was "discretionary rather than mandatory." *Gorman v. Abbott Labs.*, 629 F. Supp. 1196, 1204 (D. Del. 1986).

In exercising that discretion, the courts considered a variety of factors,[10] the most important of which was the strength of the removing defendant's argument for federal jurisdiction. Costs were awarded when lack of jurisdiction was or should have been obvious to the removing defendant,[11] but were denied when "nonremovability of the case

[9] *See In re Peterson*, 253 U.S. 300, 317-18 (1920). *But see Conley v. Ballinger*, 216 U.S. 84, 91 (1910) ("in view of the circumstances, it is just that the bill [in equity] should be dismissed [for lack of subject matter jurisdiction] without costs"; apparently applying rule that in equity allowance of costs was discretionary).

[10] *See, e.g., Johnson v. Smith*, 630 F. Supp. 1, 6 (N.D. Cal. 1986) (only half of costs awarded due to plaintiff's failure to seek remand); *Elsis v. Hertz Corp.*, 581 F. Supp. 604, 608 (E.D.N.Y. 1984) (costs awarded in part because eve-of-trial removal delayed litigation). Courts even awarded costs against a plaintiff whose conduct contributed to the improper removal or the case's sojourn in federal court. *See, e.g., Vaughan v. McArthur Bros. Co.*, 227 F. 364, 368 (8th Cir. 1915) (plaintiff allowed case to continue for eight years in federal court before moving to remand on ground he was a citizen of a different state than defendant alleged in the removal petition); *Duarte v. Donnelley*, 266 F. Supp. 380, 384 (D. Haw. 1967) (plaintiff alleged more than jurisdictional amount of damages, knowing losses were substantially lower); *Clark v. Safeway Stores, Inc.*, 117 F. Supp. 583, 584 (W.D. Mo. 1953) (removal proper, but case remanded after plaintiff amended to join nondiverse defendant).

[11] *E.g., Bucary v. Rothrock*, 883 F.2d 447, 449 (6th Cir. 1989); *Cornwall v. Robinson*, 654 F.2d 685, 687 (10th Cir. 1981); *Medical Legal Consulting Serv., Inc. v. Covarrubias*, 648 F. Supp. 153, 158 (D. Md.

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was not obvious,"[12] a "substantial question was presented,"[13] or the "question of removability was close and novel."[14] These holdings echo general case law under Fed. R. Civ. P. 54(d)(1), holding that costs may be denied when the case is "close and difficult" or raises novel issues.[15]

B. The 1988 Amendment To § 1447(c) Was Minor, Technical, And Not Intended To Change Prior Law

Adopted by Congress on the Judicial Conference's recommendation, the 1988 amendments to the removal statutes were intended to make only minor changes to modernize removal procedure without substantially altering prior law. The amendment to § 1447(c)'s third sentence, in particular, was intended solely to assure that despite elimination of the removal bond, district courts would retain the power to award expenses on remand.

1986); *Johnson*, 630 F. Supp. at 6; *Tralmer v. Galaxy Airlines, Inc.*, 611 F. Supp. 633, 635 (D. Nev. 1985); *Grodeck v. Jung*, 582 F. Supp. 544 (W.D. Va. 1984); *Dunkin Donuts v. Family Enter., Inc.*, 381 F. Supp. 371, 373 (D. Md. 1974).

[12] *Olsen v. Olsen*, 580 F. Supp. 1569, 1572 (N.D. Ind. 1984); *see also Lee v. Volkswagen of Am., Inc.*, 429 F. Supp. 5, 7 (W.D. Okla. 1976).

[13] *Turner v. Bell Fed. Sav. & Loan Ass'n*, 490 F. Supp. 104, 105 (N.D. Ill. 1980); *see also Gorman*, 629 F. Supp. at 1204 (costs denied; defendant "raised legitimate and substantial asseverations"); *Howard v. Group Hosp. Serv.*, 618 F. Supp. 38, 41 (W.D. Okla. 1984).

[14] *Capitol Cake Co. v. Lloyd's Underwriters*, 453 F. Supp. 1156, 1161 (D. Md. 1978).

[15] *Association of Mexican-American Educators v. California*, 231 F.3d 572, 592 (9th Cir. 2000); *Teague v. Bakker*, 35 F.3d 978, 997 (4th Cir. 1994); *White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 733 (6th Cir. 1986).

1. The Removal Amendments Were A Minor, Late Addition To The Omnibus 1988 Act

Work on what ultimately became the Judicial Improvements and Access to Justice Act of 1988, Pub. L. 100-702, 102 Stat. 4642 ("1988 Act") began with Representative Kastenmeier's letter to the Director of the Administrative Office of the United States Courts, requesting the Judicial Conference's participation as "an affirmative contributor" in "studying the Federal judiciary to identify potentially fruitful areas for legislative improvements," including possible changes to "the remand and removal provisions of title 28."[16]

The Judicial Conference responded affirmatively, transmitting to Congress a proposed omnibus Judicial Branch Improvements Act, covering "over thirty separate subject matter areas" covering the full gamut of the judiciary's concerns from retirement pay and travel reimbursement, to jury selection, judicial immunity and disqualification, court interpreters, and court-annexed arbitration.[17]

By far, the most controversial proposal – one which the Judicial Conference had first made several years before – was to abolish diversity jurisdiction as a means of reducing federal caseloads.[18] The vast majority of the

[16] *Court Reform and Access to Justice Act: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary*, 100th Cong., 68 (1987-88) (hereinafter "*Court Reform*").

[17] *Id.* at 13-15, 17.

[18] *Id.* at 26; *see* Report of Proceedings, Jud. Conf. of U.S., 72 (Sept. 21, 1987).

hearings were devoted to that proposal. *See Court Reform*. It eventually failed to win approval. Instead, diversity jurisdiction was only modestly narrowed by raising the jurisdictional amount from $10,000 to $50,000.[19]

The proposals to amend removal procedure generated no similar controversy. They were a late addition to the bill, having been adopted by the Judicial Conference on September 21, 1987 and transmitted to Congress two days later.[20] Seen as a non-controversial response to Representative Kastenmeier's original request, the transmittal suggested only "minor changes ... for removal procedure."[21] No live testimony was offered on the removal amendments and they attracted no public comment. *See Court Reform*, vol. 2.

The Judicial Conference Committee on Court Administration's report provided the only public explanation of the removal amendments.[22] It was copied virtually verbatim into the House Report on the bill and into the Congressional Record in connection with the Senate's consideration of the measure.[23]

[19] *See* H.R. REP. NO. 100-889, at 25 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 5985-86; *Court Reform*, at 26; Report of Proceedings, 72.

[20] Report of Proceedings, 71; *Court Reform*, 66-67.

[21] Report of the Jud. Conf. Comm. on Court Admin., App. I, at 4 (1987), *contained in* Report of Proceedings, at Agenda F-3; *Court Reform*, 66-67, 96.

[22] Report of the Jud. Conf. Comm. on Court Admin., at 37 & App. I (1987), *contained in* Report of Proceedings, at Agenda F-3; *Court Reform*, 93-99.

[23] H.R. REP. NO. 100-889, at 71-73 (1988), *reprinted in* 1988 U.S.C.C.A.N. at 6031-34; 134 CONG. REC. S16,284-01 (daily ed. Oct. 14, 1988) (statement of Sen. Heflin).

2. The 1988 Amendments Preserved Prior Law On Cost Awards

Three of the changes to removal procedure that section 1016 of the 1988 Act made are pertinent here.

First, section 1016(b)(1) substituted a notice of removal signed pursuant to Fed. R. Civ. P. 11 for the former verified petition for removal. 28 U.S.C. § 1446(a). "This change," it was explained, "is in keeping with general modern distaste for verified pleading. The sanctions available under Civil Rule 11 apply to every 'other paper', but it seems desirable to make it clear that they are available in cases of improvident removal."[24]

Second, section 1016(b)(3) abolished removal bonds by repealing former 28 U.S.C. § 1446(d), the statutory successor to § 3. The House Report explains that the bond imposed "a cost that may be substantial to some litigants, and constitutes an additional procedural complication."[25]

Third, section 1016(c) amended 28 U.S.C. § 1447(c). In addition to imposing a new 30-day limit on remand motions based on procedural defects, section 1016(c) severed and expanded the former phrase "and may order the payment of just costs" into what is now the subsection's third sentence: "An order remanding the case may require payment of just costs and any actual expenses including attorney fees incurred as a result of the removal."

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[24] H.R. REP. NO. 100-889, at 71, 1988 U.S.C.C.A.N. at 6032; *Court Reform*, 96.

[25] H.R. REP. NO. 100-889, at 72, 1988 U.S.C.C.A.N. at 6033; *Court Reform*, 97.

The House Report twice explains that the reworked cost provision effected no change in existing law, but only ensured that abolition of the removal bond would not remove the federal courts' power, initially granted by the Act of March 3, 1875, to award expenses on remand.

> [T]he proposed amendment to section 1447(c) will ensure that a substantive basis exists for requiring payment of actual expenses incurred in resisting an improper removal; civil rule 11 can be used to impose a more severe sanction when appropriate.
>
> * * *
>
> The proposal also would amend section 1447(c) to ensure that the court may order payment of actual expense caused by an improper removal. As noted above, this provision would replace the bond provision now set out in section 1446(d), which covers payment of "all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."[26]

Like its predecessor, § 1447(c)'s new third sentence said nothing about the standard for determining when costs should be awarded. The Judicial Conference suggested no change to the then-existing standards for awarding costs on remand. Nothing in amended § 1447(c), in the House Report, or in the 1988 act's other legislative history mentions standards for awarding costs on remand or evinces any congressional intent to change prior law in that respect.

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[26] H.R. REP. NO. 100-889, at 72, 1988 U.S.C.C.A.N. at 6033; *Court Reform*, 97-98.

3. The 1988 Amendment Did Not Convert § 1447(c) Into A Fee-Shifting Statute

Since 1875, the sole function of § 1447(c) and its predecessors has been to grant federal courts power to award costs when remanding a case for lack of subject matter jurisdiction. The 1988 addition of the three words "including attorney fees" did not alter that purpose. Those words did not transform the section into a fee-shifting statute, requiring fee awards against unsuccessful removing defendants except in extraordinary circumstances, as petitioners claim. *See* Pet. Brief, 12, 24-25.

First, § 1447(c)'s new third sentence does not follow the format of any of the most common types of fee-shifting statutes. It does not authorize the court to award fees;[27] or grant fees to the plaintiff,[28] or impose fee liability on the defendant,[29] as an element of relief for a claim. Instead, § 1447(c)'s third sentence speaks to the permissible contents of a remand order: "An order remanding the case may require payment of just costs and any actual expenses

[27] These fee-shifting statutes typically follow the form: "the court, in its discretion, may allow the prevailing party . . . attorney's fees as part of costs. . . . *See, e.g.*, 15 U.S.C. §§ 77ooo(e); 77www(a); 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), 7604(d).

[28] Fee-shifting statutes of this type use the following form: "any person who shall be injured . . . by reason of anything forbidden [by federal] laws . . . shall recover . . . damages . . . , and the cost of suit, including a reasonable attorney's fee." *See, e.g.*, 11 U.S.C. § 362(h); 15 U.S.C. § 15(a).

[29] "[A]ny person who . . . fail[s] to comply [with federal law] . . . is liable to [any affected] consumer [for] . . . actual damages . . . [and] the costs of the action together with reasonable attorney's fees as determined by the court" is typical wording for this type of fee-shifting statute. *See, e.g.*, 15 U.S.C. §§ 1640(a)(3), 1679g(a)(3), 1681n(a)(3), 1681o(a)(2).

including attorney fees incurred as a result of the removal."

Second, the 1988 amendment's legislative history reveals no intent to shift attorney fees in any case remanded to state court, let alone in most or all such cases. Neither the Judicial Conference Committee report nor the House Report says a word about attorney fees. There was no public testimony on the subject. No member of the public commented on it.

Third, the legislative history's silence on the issue of attorney fees speaks volumes. Adding a fee-shifting provision to the removal statutes would effect a major change in existing law, and one likely to spark controversy. Petitioners' proposed standard for fee shifting would have been particularly controversial. Not only would it carve a large exception to the American Rule, but it would reverse pre-1988 case law under § 1447(c), punish defendants for removing in cases where this Court has declined to provide any "precise, all-embracing test" of federal jurisdiction, clash with Fed. R. Civ. P. 11 and rules of professional responsibility, and interfere with an attorney's ethical obligation to represent his or her client zealously.[30]

[30] Contrary to the pre-1988 cases cited above, see p. 11, petitioners argue fees should be awarded particularly when the question of removability is close and novel or difficult to decide, *see* Pet. Brief, 18-22, as in those areas where this Court has refrained "from stating a 'single, precise, all-embracing' test for" removal jurisdiction in federal question cases, *Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg.*, ___ U.S. ___, 125 S.Ct. 2363, 2368 (2005). Petitioners' proposed standard also clashes with Fed. R. Civ. P. 11 and rules of professional responsibility, both of which permit good faith, nonfrivolous arguments to extend, modify or reverse existing law. As those rules recognize, a lawyer owes a duty "both to his client and to the legal system, . . . to

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The Judicial Conference would certainly have recognized the controversial nature of such a change. It would not have tried to slip such a significant change through Congress under the false flag of a proposal of only "[m]inor changes . . . for removal procedure." *Court Reform*, 96. Nor would the Conference have left that far-reaching change unmentioned while detailing much less important features of the proposed amendment in its transmittal to Congress. *See Court Reform*, 95-99.

Such a significant change would most likely have encountered opposition in Congress and from the public. Yet no one said anything publicly about attorney fees in connection with the 1988 amendment to § 1447(c). As this Court said in *Fogerty*, 510 U.S. at p. 534: "we find it impossible to believe that Congress, without more, intended to adopt the British Rule. Such a bold departure from traditional practice would have surely drawn more explicit statutory language and legislative comment."[31] (Citations omitted.)

Finally, a different explanation of the three added words – "including attorney fees"[32] – readily suggests

represent his client zealously within the bounds of the law," which may be ambiguous and is never static. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 & cmt. [1]; MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (1980).

[31] *See also Church of Scientology v. IRS*, 484 U.S. 9, 17-18 (1987) ("an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 255 (1992) (Stevens, J., concurring);

[32] Apart from those words, § 1447(c)'s new third sentence is a close paraphrase of former § 1446(d)'s phrase "all costs and disbursements incurred by reason of the removal proceedings."

itself: The words "including attorney fees" were added to the sentence to make it clear that a district court had the power to award fees as well as costs upon remand, when allowed by other law. This purpose is consistent with the function § 1447(c) and its predecessors had performed since 1875.

So interpreted, the three new words effect at most a "minor change" in existing law, consistent with the Judicial Conference's representation to Congress. *Court Reform*, 96. Yet, the words still serve an important purpose. They give substance to § 1446(a)'s new, express threat of sanctions under Fed. R. Civ. P. 11 for frivolous notices of removal, granting the district court power to award the most common form of Rule 11 sanctions – attorney fees – even when the court lacked subject matter jurisdiction.[33] As a leading treatise noted at the time: "It would be desirable in some cases to tax the removing parties with an attorney's fee on the motion to remand, but an amendment of the statute probably is necessary to provide the courts with authority to do so. . . . " 14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE, § 3739 at 587-88 (1986), *quoted in Medical Legal Consulting Serv.*, 648 F. Supp. at 158.

The three new words also resolved the lower federal courts' discord over the awardability of attorney fees under

[33] Though this Court later held that Rule 11 sanctions could be imposed though the court lacked subject matter jurisdiction, *Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992), the issue was still debatable when § 1447(c) was amended in 1988. Moreover, absent the 1988 amendment, the common law rule would still bar fee awards under other statutes in cases remanded for want of subject matter jurisdiction. *See Branson*, 62 F.3d at 293; *Correspondent Serv. Corp.*, 2004 WL 2181087 at *14-16.

§ 1447(c)'s prior wording.[34] *See Barron's Educ. Series, Inc. v. Hiltzik*, 987 F. Supp. 224, 226 (E.D.N.Y. 1997).

In short, the words "including attorney fees" share the same limited purpose as the rest of § 1447(c)'s new third sentence: assuring that despite elimination of the removal bond, district courts retain the power to award costs and expenses, including fees, when remanding cases for lack of subject matter jurisdiction. After 1988 as before, § 1447(c) said nothing about the circumstances under which that power should be exercised. As to both fees and costs, it left that determination to other applicable law, such as 28 U.S.C. § 1920, Fed. R. Civ. P. 11 and 54(d), the recognized equitable exceptions to the American Rule, or other contractual or statutory fee-shifting provisions.

[34] Before the 1988 amendment, most lower federal courts held that because § 1447(c) mentioned only "costs," it did not authorize an award of attorney fees, which could be awarded only when authorized under Fed. R. Civ. P. 11 or the bad faith exception to the American Rule. *E.g., Cornwall*, 654 F.2d at 687; *Wolst v. American Airlines, Inc.*, 668 F. Supp. 1117, 1120 (N.D. Ill. 1987); *Medical Legal Consulting Serv., Inc.*, 648 F. Supp. at 158-59; *Schmidt v. Nat'l Org. for Women*, 562 F. Supp. 210, 214-15 (N.D. Fla. 1983). But a minority of district court cases held that attorney fees or at least attorney docket fees (see 28 U.S.C. § 1923) could be awarded under § 1447(c) or its predecessors. *E.g., Elba Township v. Steffenhagen*, 664 F. Supp. 1238, 1241 (E.D. Wis. 1987); *Syms, Inc. v. IBI Sec. Serv., Inc.*, 586 F. Supp. 53, 57 (S.D.N.Y. 1984); *Elsis*, 581 F. Supp. at 608; *Baas v. Elliot*, 71 F.R.D. 693, 694 (E.D.N.Y. 1976); *Kramer v. Jarvis*, 86 F. Supp. 743, 746 (D. Neb. 1949); *Pellett v. Great Northern Ry. Co.*, 105 F. 194 (C.C.D. Wash. 1900); *Josslyn v. Phillips*, 27 F. 481 (C.C.W.D. Mich. 1886).

II. Alternatively, Treated As A Fee-Shifting Statute, § 1447(c) Requires A Multi-Factor Analysis With Reasonableness Of Removal As The Primary Factor

If § 1447(c) is held to be a fee-shifting statute, the appropriate legal standard to guide the district courts in exercising their discretion to award fees under that section is a multi-factor test similar to the one this Court adopted in *Fogerty*, with the primary factor being the reasonableness of the grounds for removal. That conclusion flows from proper analysis of the "large objectives" of the pertinent statutes and the applicable equitable considerations.

A. This Court's Prior Decisions Identify The Factors Relevant To Setting The Standard For Awarding Fees Under Fee-Shifting Statutes

Piggie Park,[35] *Christiansburg Garment Co.*, *Zipes*, and *Fogerty* provide the framework for setting the standard for awarding fees under § 1447(c), if it is treated as a fee-shifting statute. That framework does not differ significantly from the Court's normal method of statutory interpretation. *See Board of Trustees v. JPR, Inc.*, 136 F.3d 794, 802 (D.C. Cir. 1998).

First, the Court looks to the statutory language and structure, similar language being a strong, but not conclusive, indication that statutes are to be treated similarly. *Fogerty*, 510 U.S. at 523; *Zipes*, 491 U.S. at 758 n.2.

[35] *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

Second, the Court reviews the statute's legislative history, searching for evidence of congressional intent. *Fogerty*, 510 U.S. at 523-24; *Christiansburg Garment Co.*, 434 U.S. at 420.

Third, the Court considers the "large objectives" of the statute. *Zipes*, 491 U.S. at 758-59. For example, in civil rights cases such as *Piggie Park, Christiansburg Garment Co.*, and *Zipes*, plaintiffs are "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" *Christiansburg Garment Co.*, 434 U.S. at 418. In those cases and in other areas where Congress has enacted fee-shifting statutes "to encourage citizen enforcement of important federal policies,"[36] the Court has adopted plaintiff-friendly standards to govern fee awards.[37] Prevailing plaintiffs are entitled to fees "unless special circumstances render the award unjust." *Piggie Park*, 390 U.S. at 402. Prevailing defendants cannot recover fees unless the suit is "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co.*, 434 U.S. at 421.

By contrast, when the statute pursues more complex, more measured objectives than simply encouraging private suits to enforce federal policy, the Court has adopted

[36] *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 560 (1986) (hereinafter "*Delaware Valley*").

[37] Another critical factor in such cases is the connection between liability for violation of federal law and liability for attorney fees. *Zipes*, 491 U.S. at 762-63. Defendants who have judgments entered against them in civil rights and other similar cases are decreed to have violated federal law. Unsuccessful plaintiffs or interveners bear no such taint. Ergo, losing defendants pay fees in most cases; whereas, losing plaintiffs or interveners do not. *Id.*

a party-neutral fee award standard, based on a multi-factor analysis or relevant circumstances. *Fogerty*, 510 U.S. at 526, 534-35.

Finally, the Court's analysis has also "embrace[d] certain 'equitable considerations,'" such as whether there is typically an economic imbalance between plaintiffs and defendants that Congress meant to redress through the fee-shifting statute. *Fogerty*, 510 U.S. at 524; *Zipes*, 491 U.S. at 759.

As shown below, each step of this analysis points to the same conclusion: If it is a fee-shifting statute, § 1447(c) is most appropriately governed by a party-neutral standard, based on a consideration of multiple relevant factors.

B. Neither Statutory Language Nor Legislative History Supports A Plaintiff-Biased Fee Award Standard

Apart from the words "may" and "attorney fees," § 1447(c)'s language bears little resemblance to the wording of the civil rights statutes' fee-shifting provisions or most other fee-shifting statutes.[38] *See* p. 16 above. Hence, § 1447(c)'s wording provides no "strong indication" that it is to be interpreted like the statutes construed in *Piggie Park, Christiansburg Garment Co., Delaware Valley*, and *Zipes*. *See Fogerty*, 510 U.S. at 523. Indeed, its words "may require" and "just costs" strongly suggest that Congress granted district courts broad discretion in deciding when to award costs and fees on remand.

[38] *See also Wisconsin v. Hotline Indus., Inc.*, 236 F.3d 363, 366-67 (7th Cir. 2000) (pointing out § 1447(c)'s "unusual" phrasing in another respect).

Petitioners wrongly claim that § 1447(c) is structurally party-biased, permitting fee awards only against defendants when a case is remanded. *See* Pet. Brief, 24-25, 31. In fact, the statute does *not* state that fee awards may be made only against defendants, but rather that the remand order may require payment of actual expenses, including attorney fees.[39] Furthermore, § 1447(c) is properly paired with § 1919, both having originated as portions of § 5. *See* pp. 8-9, above. The former authorizes awards on remand, primarily against defendants; the latter, awards on dismissal, primarily against plaintiffs. Together, the two sections form a party-neutral system.

To be sure, neither § 1447(c) nor § 1919 provides for an award when a party, plaintiff or defendant, *opposes* federal jurisdiction on frivolous grounds. In those situations, the court has subject matter jurisdiction and unquestionably may award sanctions, fees, and costs along with other appropriate relief, so neither § 1447(c) nor § 1919 need confer power to award costs or fees under those frivolously opposing federal jurisdiction.[40] Granting

[39] Both before and after the 1988 amendment, courts have awarded costs or fees on remand against plaintiffs when their conduct has led to the improvident removal or has prolonged the case's tenure in federal court. *E.g., Shrader v. Legg Mason Wood Walker, Inc.*, 880 F. Supp. 366, 369-71 (E.D. Pa. 1995); *Barraclough v. ADP Automotive Claims Serv., Inc.*, 818 F. Supp. 1310, 1313 (N.D. Cal. 1993); *see also* cases cited above at p. 10, n.10. *But see Fowler v. Safeco Ins. Co.*, 915 F.2d 616, 618 (11th Cir. 1990) (§ 1447(c) allows cost awards only against removing defendants).

[40] Petitioners also vainly try to discover significance in the 1988 amendment's deletion of the word "improvidently." *See* Pet. Brief, 24. "Improvidently" previously modified both the court's obligation to remand and its power to award costs. If deleting the word expanded the courts' power to award costs, it likewise expanded their obligation to remand. Nothing in the amendment's legislative history shows any

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federal courts the power to award fees and costs when they *lack* subject matter jurisdiction historically was and still is § 1447(c)'s purpose – one it fully serves whatever standard the Court adopts for fee awards. *Compare* pp. 8-9 above *with* Pet. Brief, 25.

As already shown, the legislative history of § 1447(c) and its 1988 amendment refutes petitioners' contention that the 1988 amendment was intended either to discourage removal or to shift the plaintiff's often-substantial fees to the removing defendant in nearly all cases remanded to state court. *See* pp. 12-20 above.

The few bits of legislative history that petitioners cite for their contrary argument are drawn from the general discussion section of the 1988 House Report. Pet. Brief, 11. While those snippets show Congress was concerned that federal courts were overloaded, they do not support petitioners' notion that every section of the omnibus 1988 Act was intended to address that problem. Some of the Act's provisions – particularly, its section increasing the amount in controversy requirement for diversity cases – did attempt to restrict federal case filings, but many of the Act's 30 separate subjects bore no relation to federal caseloads. Changes in those areas were enacted for other purposes.[41]

intent to achieve either effect. Rather, the word's deletion was a non-substantive change made solely to modernize the statutory text.

[41] *See, e.g.*, Pub. L. 100-702, §§ 302 (Federal Judicial Center authorized to encourage programs relating to history of judicial branch), 701-712 (court interpreter provisions), 1003 (exemption of law clerks, magistrate judges and bankruptcy judges from federal leave act), 1005 (military retirement pay for senior and retired federal judges), 1007 (change to judicial disqualification provisions), 1008

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The 1988 amendments to the removal statutes were among the sections enacted for other purposes. They were proposed by the Judicial Conference separately from the rest of its many recommendations that were incorporated in the same act. *See* p. 13 above. The Judicial Conference's separate transmittal, later copied in the House Report on the bill, does not recommend that any removal statute be changed in order to discourage removal or to lessen federal caseloads, much less that § 1447(c) should be amended for those purposes.[42]

Silence on this point is compelling evidence, as the transmittal expressly mentioned other respects in which the proposed amendments *were* intended to slightly broaden or restrict removal jurisdiction.[43] Had the amendment to § 1447(c) been intended to staunch the flow of removals, that fact would have been mentioned as well. Petitioners' contrary argument presupposes either that the Judicial Conference did not understand its own proposal

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(incentive awards to judicial branch employees), 1017 (cost-of-living adjustments for judicial survivors' annuities), 1021 (reconfiguration of Florida districts).

[42] H.R. REP. NO. 100-889, at 71-73, 1988 U.S.C.C.A.N. at 6031-33; *Court Reform*, 95-99.

[43] The 1988 amendments slightly expanded removal diversity jurisdiction by providing that the citizenship of Doe defendants could be disregarded and by setting a 30-day limit on remand motions based on procedural defects in removal. Pub. L. 100-702, § 1016(a), (c)(1) (amending 28 U.S.C. §§ 1441(a), 1447(c)). They slightly restricted diversity removal jurisdiction by disallowing removal more than a year after an action is commenced. Pub. L. 100-702, § 1016(b)(2)(B) (amending 28 U.S.C. § 1446(a)). Each of these changes and their effect on removal jurisdiction is expressly detailed in the Judicial Conference transmittal and the House Report. H.R. REP. NO. 100-889, at 71-72, 1988 U.S.C.C.A.N. at 6032-33; *Court Reform*, 95-98. None are justified as measures to reduce federal caseloads. *Id.*

or that it purposefully misrepresented the proposal's effect in its transmittal to Congress. *See* Pet. Brief, 12. Neither hypothesis – lack of mental acuity or mendacity – is worthy of serious consideration.

Before 1988, federal courts applied a party-neutral standard under § 1447(c), using a multi-factor analysis, the principal factor being the reasonableness of the grounds for removal. *See* pp. 10-11 & nn. 10-14 above. Nothing in the 1988 amendment, the Judicial Conference's transmittal to Congress, the House Report, or any other portion of the 1988 Act's legislative history even hints at any intent to change that standard. To the contrary, the Judicial Conference assured Congress it proposed only "minor changes" in removal procedures. *Court Reform*, 96.

C. A Party-Neutral Fee Standard Best Promotes The Objectives Of Federal Jurisdiction And Removal Statutes

Like statutory language and history, statutory objectives support a party-neutral, multi-factor test for awarding fees under § 1447(c). Unlike the civil rights fee-shifting statutes, § 1447(c) was *not* enacted to promote citizen enforcement of important federal policies. Contrary to petitioners' argument, lowering federal case filings is not the sole objective of either federal jurisdiction and removal statutes generally, or § 1447(c) in particular. Rather, those statutes promote other federal policies that Congress deemed more important and that defendants may advance by removing cases to federal court.

1. Federal Jurisdiction Statutes Promote Many Important Policies Other Than Barring Federal Courthouse Doors

Like the Copyright Act examined in *Fogerty*, the statutes governing federal jurisdiction serve policies "more complex, more measured than simply [minimizing] the number of [federal] suits. . . ." *Fogerty*, 510 U.S. at 526.

This Court has repeatedly confirmed that Congress may give, withhold, restrict, or take away the jurisdiction of the lower federal courts as it sees fit.[44] So, if decreasing the flow of cases into federal courts were Congress' sole objective as petitioners claim, *see* Pet. Brief, 18-19, it could easily have achieved that goal by repealing Chapters 85 and 89 (beginning with §§ 1330 and 1441) of Title 28 and withholding any new grants of jurisdiction.

Congress has not chosen that course. Instead, it has enacted statutes granting or enlarging federal jurisdiction in order to serve a variety of other policies it deems more important. For example, 28 U.S.C. § 1343 grants federal courts jurisdiction in civil rights cases to vindicate the same anti-discrimination policy that "Congress considered of the highest priority" and also promoted by the statutes construed in *Piggie Park, Christiansburg Garment Co., Delaware Valley* and *Zipes*.[45]

[44] *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922); *United States v. Klein*, 80 U.S. (13 Wall.) 128, 145 (1872); *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845).

[45] *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-45 (1972). Congress enacted § 1343's predecessor to enlarge federal jurisdiction so federal courts could enforce rights, newly protected by the Fourteenth Amendment, which the state courts were not adequately vindicating.

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So, too, what is now 28 U.S.C. § 1331 (federal question jurisdiction) was originally enacted as § 1 of the Act of March 3, 1875, as a deliberate "expansion of national authority over matters that, before the Civil War, had been left to the States." *Lynch*, 405 U.S. at 548. The advantages of "the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues" override concern about federal caseloads. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367. As originally enacted, § 1331 contained an amount-in-controversy requirement in order "to reduce congestion in the federal courts." *Lynch*, 405 U.S. at 549; 18 Stat. 470. That requirement was repealed in 1980, Congress deeming it more important that "federal courts should bear the responsibility of deciding all questions of federal law" than that the federal caseload be reduced.[46]

The other statutes granting federal courts jurisdiction also serve purposes sufficiently important that Congress has enacted and retained them despite the fact they increase federal courts' work. *See, e.g.*, 28 U.S.C. §§ 1330 (suits against foreign sovereigns),[47] 1334 (bankruptcy cases),[48] 1338 (patent, copyright, trademark and unfair

See Monroe v. Pape, 365 U.S. 167, 173-74 (1961), *overruled on other grounds by Monell v. Dept. of Social Services*, 436 U.S. 658, 663 (1978).

[46] Pub. L. 96-486, § 2(a), 94 Stat. 2369; H.R. REP. NO. 96-1461, at 1-2 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5063, 5063-64.

[47] *See* H.R. REP. NO. 94-1487, at 12-13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 489-91 (1983).

[48] *See* H.R. REP. NO. 95-595, at 43-52 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5963, 6005-13.

competition cases),[49] 1340 (internal revenue cases), 1344 (federal election cases), 1345, 1346 (cases in which the United States is a party), and 1358 (federal eminent domain cases).

Diversity jurisdiction, too, serves important policies that led the Framers to give it constitutional stature, U.S. Const., art. III, § 2, and have not only prevented its abolition, despite the Judicial Conference's repeated recommendations, but triggered its resurgence and expansion in specific types of complex litigation. *E.g.*, 28 U.S.C. §§ 1332(d) (class and mass actions),[50] 1335 (interpleader),[51] 1367 (supplemental jurisdiction),[52] 1369 (multiparty, multiforum mass accident cases).[53]

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[49] *See Maternally Yours, Inc. v. Your Maternity Shop, Inc.*, 234 F.2d 538, 543-44 (2d Cir. 1956); Reviser's Notes to 28 U.S.C.A. § 1338(b), 1948 Revision of Judicial Code.

[50] *See* S. REP. NO. 109-14, at 4-6, 8-14, 22-27 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5-7, 9-15, 23-27.

[51] This section originated in the Act of Feb. 22, 1917, ch. 113, 39 Stat. 929, which was adopted in reaction to *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916). The section gives stakeholders federal recourse from potentially conflicting decrees of different states' courts. *See* Thomas D. Rowe, Jr. & Kenneth D. Sibley, *Beyond Diversity: Federal Multiparty, Multiforum Jurisdiction*, 135 U. PA. L. REV. 7, 8 (1986).

[52] *Exxon Mobil Corp.*, 125 S.Ct. at 2618 (purpose of diversity jurisdiction "is to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants").

[53] *See* H.R. CONF. REP. NO. 107-685, at 199-202 (2002), *reprinted in* 2003 U.S.C.C.A.N. 1120, 1151-54.

2. Federal Removal Statutes, Including § 1447, Were Not Enacted To Discourage Resort To Federal Court

Focusing more narrowly on federal removal statutes, and still more specifically on § 1447(c) and its amendment in 1988, the Court will reach the same conclusion. Reducing congestion in federal courts is not these statutes' primary objective. They serve other federal policies that Congress has deemed important enough to justify opening a federal forum to those initially sued in state court.

> [T]he right of removal probably was designed [originally] to protect nonresidents from the local prejudices of state courts. The rather limited right to remove given in 1789 to aliens and nonresident defendants was expanded by a series of statutes, a great many of which were enacted in the aftermath of the Civil War. These culminated in 1875 in legislation [Act of March 3, 1875, § 2; 18 Stat. 470] that permitted removal, subject only to the then-required jurisdictional amount of $500, of virtually all cases within the constitutionally apportioned judicial power of the federal courts.[54]

Though somewhat restricted in 1887,[55] broad removal jurisdiction has remained a key component of federal practice ever since, extending to all cases over which the federal courts might exercise original jurisdiction "[e]xcept

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[54] 14B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3721 (3d ed. 2004) (fns. omitted).

[55] Act of March 3, 1887, 24 Stat. 552, corrected by Act of August 13, 1888, 25 Stat. 433.

as otherwise expressly provided by Act of Congress. . . ."[56] As the Class Action Fairness Act of 2005 reminds, removal jurisdiction continues to serve federal policies that Congress deems of greater importance than lessening federal courts' workload.[57] *See also Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367-68.

Nor is it § 1447(c)'s objective to deter defendants from removing cases to federal court. Rather, since the original enactment of its predecessor in 1875, that provision's function has been to empower federal courts to award costs when they lacked subject matter jurisdiction, contrary to the common-law rule. *See* pp. 8-9 above. As already seen, neither the 1988 amendment's text nor its legislative history indicates any intention to turn away from that historical purpose or to transform § 1447(c) into an anti-removal in terrorem clause. *See* pp. 12-20 above.

Moreover, it is improbable that the Judicial Conference would have proposed, or that Congress would have accepted, shifting fees on remand as a means to reduce federal litigation. Shifting fees at best would have only a minimal effect on federal case filings.[58] Had the goal been

[56] 28 U.S.C. § 1441(a); *Breuer v. Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 697-98 (2003).

[57] *See* S. REP. NO. 109-14, at 9, 22-27, 48-50, 2005 U.S.C.C.A.N. at 10, 22-27, 45-47.

[58] In 2004, 34,443 cases were removed to federal court, accounting for only 12.2% of new federal civil cases. LEONIDAS R. MECHAM, 2004 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS, table S-7. There are no published statistics on remands, but they doubtless constitute well fewer than half of all removals. At best, shifting fees on remand might deter the filing of some percentage of those unsuccessful removals, decreasing total federal civil filings by an imperceptible amount, most likely substantially less than 5%.

to decrease federal caseloads, the Judicial Conference and Congress would surely have chosen more effective means, such as abolishing diversity jurisdiction – a measure actually proposed to achieve that goal, but one which failed to secure congressional approval.

In short, the statutes governing federal jurisdiction and removal generally and § 1447, in particular, serve a variety of federal policies Congress deemed more important than simply minimizing the number of cases in federal court. Petitioners' suggestion that § 1447(c) was amended in 1988 in order to deter defendants from removing cases from state court finds no support in the amendment's legislative history or elsewhere.

D. Equitable Considerations Also Favor A Party-Neutral Standard

1. State Court Plaintiffs Vindicate No Congressional Policy, Though Removing Defendants May Do So

Unlike those who bring civil rights actions, plaintiffs whose cases are remanded to state court cannot claim to be "the chosen instrument of Congress." They do not enforce federal law; otherwise, their suits would not be remanded, except perhaps for procedural defects in removal. 28 U.S.C. §§ 1331, 1441(a). By pursuing state law claims, these plaintiffs effectuate no federal policy, least of all any "that Congress considered of the highest priority." *Christiansburg Garment Co.*, 434 U.S. at 418.

By contrast, a defendant may vindicate important federal policies by removing a state court case to federal court. For example, removal of a case wholly preempted by federal law may prevent state law from interfering with

Congress' regulation of vital segments of the national economy. *See, e.g., Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003). Removal may allow a federal forum for decision of important issues of federal law or vindication of federal agencies' actions. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2367-68. Bankruptcy removals promote the goal of unifying resolution and administration of bankruptcy matters in a single court system. Removal of mass accident cases and now nationwide class actions furthers other important federal concerns.

Of course, no federal policy is advanced by an *unsuccessful* attempt to remove a case. But that is not the relevant inquiry. *See* Pet. Brief, 18, 23, 31. Rather, the issue is whether Congress chose to discourage even meritorious removals by imposing liability for plaintiffs' attorney fees as the price of failure. It did not. To paraphrase *Fogerty*, 510 U.S. at 527:

> Because [removal] law ultimately serves the purpose of [advancing important federal policies] through access to [federal court], it is peculiarly important that the boundaries of [removal] law be demarcated as clearly as possible. To that end, defendants who seek to advance a variety of meritorious [grounds for removal] should be encouraged to litigate them to the same extent that plaintiffs are encouraged to litigate meritorious claims [for remand].

2. An Unsuccessful Removal Is No Violation Of Federal Law

This Court's "cases have emphasized the crucial connection between liability for violation of federal law and liability for attorney's fees under federal fee-shifting

statutes." *Zipes*, 491 U.S. at 762. Defendants who remove cases on tenable, but ultimately unavailing, grounds are like the intervenors in *Zipes*. They have not violated any federal statute or infringed on anyone's federally protected rights.

The distinction "between wrongdoers and the blameless" is crucial as "fee liability and merits liability run together." *Zipes*, 491 U.S. at 763. An order remanding a case to state court does not hold the defendant liable on the merits. The defendant may well prevail on the merits in state court after remand, even on a federal preemption defense first raised unsuccessfully as a ground for removal under the complete preemption or artful pleading doctrines.[59]

3. There Is No Economic Imbalance Between State Court Plaintiffs And Removing Defendants

In civil rights and other statutes, Congress has enacted fee-shifting provisions to redress a perceived economic imbalance between plaintiffs and defendants. *Fogerty*, 510 U.S. at 524. No such imbalance exists between state court plaintiffs and removing defendants. Rather, both sides in removed cases "can run the gamut from corporate behemoths to starving artists." *Id.*; *see, e.g., Topeka Housing Auth. v. Johnson*, 404 F.3d 1245 (10th Cir. 2005) (corporate plaintiff; pro se removing defendant);

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[59] *See, e.g., McIntosh v. Atchison, T. & S. F. Ry. Co.*, 19 Kan. App. 2d 814, 877 P.2d 11 (Kan. App. 1994); *Moreau v. San Diego Transit Corp.*, 210 Cal. App. 3d 614, 258 Cal. Rptr. 647 (1989).

Valdes v. Wal-Mart Stores, Inc., 199 F.3d 290 (5th Cir. 2000) (reverse alignment).[60]

In a civil rights suit vindicating dignitary interests, non-monetary relief, such as an injunction, is often the primary or only remedy available. Fee-shifting in these cases is particularly important to overcome the otherwise substantial financial disincentive to sue. *Piggie Park*, 390 U.S. at 402. There is no similar disincentive to sue when the underlying statute protects economic, not dignitary, interests. Therefore, "[i]n general, statutes protecting economic interests that contain fee-shifting provisions vesting discretion in the district court do not create a presumption that a prevailing party will be awarded fees." *Eddy v. Colonial Life Ins. Co.*, 59 F.3d 201, 205 (D.C. Cir. 1995). Only economic, not dignitary, interests are protected by § 1447(c).

Also, plaintiffs are as likely to engage in disreputable practices in efforts to avoid removal as defendants are to attempt removal of cases in which the federal courts clearly lack jurisdiction. *E.g., Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907); *In re Diet Drugs Prod. Liab. Litig.*, 220 F. Supp. 2d 414, 420-25 (E.D. Pa. 2002). An even-handed standard for cost and fee awards best remedies abuses on both sides.

[60] Petitioners' assertion that "in our experience" most removals are by corporations in suits brought by individuals, *see* Pet. Brief, 33, provides no sound basis for concluding that Congress perceived any economic imbalance between state court plaintiffs and removing defendants or amended § 1447(c) to redress it. Petitioners' necessarily limited experience is not statistically significant and was not disclosed to Congress in 1988.

4. To Remove, Defendants Must Act Quickly, Without Discovery, When Facts Or Law Or Both Are Uncertain

Another pertinent equitable factor is the removing defendant's uniquely disadvantageous position. A defendant has only 30 days in which to exercise or waive its right to remove. 28 U.S.C. § 1446(b). In that short period, it must find the facts, determine the applicable law, and persuade any co-defendants to join it.

Determining the facts is often difficult as many facts on which removal jurisdiction may depend are not known or readily available to the defendant. For example, the complaint is often silent, ambiguous or confusing as to the amount in controversy. *See, e.g.*, JA 9-33, 35, 42-43, 58-60. Under most states' procedures, there will be insufficient time to conduct discovery before the notice of removal must be filed. In many cases, the defendant is forced to make its best judgment quickly based on limited information. The defendant's task may be particularly difficult when the plaintiff has fraudulently joined nondiverse parties or engaged in other improper tactics to avoid removal. *See, e.g., McKinney v. Board of Trustees*, 955 F.2d 924, 927-28 (4th Cir. 1992); *In re Diet Drugs Prod. Liab. Litig.*, 220 F. Supp. 2d at 420-25.

Adding to the uncertainty, there are many areas of federal jurisdiction where the law is unclear[61] or lower

[61] As the lower courts found in this case, federal jurisdictional law was unclear in at least two critical areas when this case was removed. *Martin v. Franklin Capital Corp.*, 393 F.3d 1143 (10th Cir. 2004); Pet. 7a-13a. Other areas of uncertainty abound with respect to long-standing jurisdictional statutes, let alone with respect to new ones like 28 U.S.C. § 1332(d). Just last term, this Court acknowledged that it has

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court decisions are in conflict.[62] Consequently, a removing defendant often finds itself as uncertain about what law will be applied as it is about what the facts are. Where such uncertainty abounds, it is inequitable to impose fees on a defendant that makes a good faith, reasonable effort to determine the applicable law and facts, but in hindsight is held wrong.[63]

In short, all of the factors this Court has considered significant in determining the standard for awards under fee-shifting statutes counsel against adopting any categorical rule requiring or banning attorney fee awards on remand in all but exceptional cases. If treated as a fee-shifting

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refrained from adopting any "single, precise, all-embracing test" for removal in federal question cases. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2368, 2372 (Thomas, J., concurring).

[62] Just last term, this Court resolved the long-enduring conflict over the scope of supplemental jurisdiction, see *Exxon Mobil Corp.*, 125 S.Ct. at 2618, but many other conflicts remain to complicate a removing defendant's task. *Compare McKinney*, 955 F.2d at 926-27 (each later-served defendant may remove within 30 days after service on it) *with Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir. 1986) (removal period ends 30 days after service on first defendant). *See also Adams v. Charter Communications VII, LLC*, 356 F. Supp. 2d 1268, 1272-73 (M.D. Ala. 2005) (adopting later rule after noting the 11th Circuit has not decided the issue).

[63] Petitioners wrongly argue that a defendant should never remove unless it is certain the case is removable because all doubts are resolved against retaining the case in federal court. *See* Pet. Brief, 21. The rule petitioners cite applies only if doubt remains after the jurisdictional facts and law are fully litigated. It does not apply to the necessarily doubt-laden circumstances under which most defendants must decide, at their peril, whether to remove. Nor is there any authority for petitioners' assertion that this rule bars a defendant from removing on new or novel legal theories. *Id.* at 22. By that mistaken theory, no defendant should ever invoke the newly enacted 28 U.S.C. §§ 1332(d), 1453, as they create "new law" "expand[ing] federal jurisdiction beyond its traditional limits." *Id.*

statute, § 1447(c)'s third sentence should be read, as in *Fogerty*, to require a party-neutral test based on a multi-factor analysis.

E. The Party-Neutral Multi-Factor Test Applied By Most Lower Federal Courts Is The Appropriate Standard For Awarding Fees Under § 1447(c)

Consistent with settled pre-1988 case law as well as most post-1988 decisions,[64] a party-neutral, multi-factor test should govern awards under § 1447(c).

The most important factor in that analysis should be "the nature of the defect in the attempted removal and where the defendant's erroneous action seems to fall on a spectrum running from reasonable to frivolous."[65] An award is appropriate when non-removability should have been obvious.[66]

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[64] Of the Courts of Appeals, only the Seventh Circuit appears to have adopted a standard that favors plaintiffs. The Seventh Circuit's "presumption" that the plaintiff is entitled to fees on remand is based on a misreading of its own prior decision that presumed entitlement to fees on appeal once fees were awarded in the district court, not entitlement to fees in the district court. *See Sirotzsky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003) (*citing Garbie v. Daimler-Chrysler Corp.*, 211 F.3d 407, 411 (7th Cir. 2000)); *see also* Pet. Brief, 16.

[65] 14C CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3739 (3d ed. 2004); *Hornbuckle v. State Farm Lloyds*, 385 F.3d 538, 541 (5th Cir. 2004) (We "consider the objective validity of the removing party's efforts, at the time that party attempted to remove the case."); *Daleske v. Fairfield Communications, Inc.*, 17 F.3d 321, 324 (10th Cir. 1994) ("propriety of the defendant's removal continues to be central"); *Miranti v. Lee*, 3 F.3d 925, 928 (5th Cir. 1993) (same).

[66] *Hart v. Wal-Mart Stores, Inc. Associates' Health & Welfare Plan*, 360 F.3d 674, 679-81 (7th Cir. 2004); *Hofler v. Aetna US Healthcare of*

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Conversely, no award should be made if the case was properly removed but is later remanded, in whole or in part, in the district court's discretion – as under 28 U.S.C. §§ 1332(d)(3), (4), 1334(c), or 1367(c) – or due to later developments.[67]

Cases lying between these extremes call for careful weighing of the reasonableness of the grounds for removal. In general, when the removing defendant advances reasonably debatable grounds for removal, costs and fees should be denied, particularly if the grounds for removal are novel or raise difficult jurisdictional issues.[68]

The decision to award fees or costs in particular cases may also properly be influenced by such other factors as:

Cal., Inc., 296 F.3d 764, 770 (9th Cir. 2002); *Garcia v. Amfels, Inc.*, 254 F.3d 585, 587-88 (5th Cir. 2001); *Suder v. Blue Circle, Inc.*, 116 F.3d 1351, 1352-53 (10th Cir. 1997); *Mints v. Educational Testing Serv.*, 99 F.3d 1253, 1261 (3d Cir. 1996).

[67] No costs or fees should be awarded, for example, when the district court exercises its discretion to remand state-law claims after dismissing the federal-law claims on which removal was based, or remands after allowing the plaintiff to join a new defendant who destroys diversity or to amend to disclaim damages over the jurisdictional amount. *See, e.g., Jeffrey v. Cross Country Bank*, 131 F. Supp. 2d 1067, 1070 (E.D. Wis. 2001).

[68] *Martin*, 393 F.3d at 1148-51; Pet. 6a-13a; *Roxbury Condominium Ass'n, Inc. v. Anthony S. Cupo Agency*, 316 F.3d 224, 228 (3d Cir. 2003); *Valdes*, 199 F.3d at 293-94; *In re Lowe*, 102 F.3d 731, 733 n.2 (4th Cir. 1996); *Virgin Islands Housing Auth. v. Coastal Gen. Constr. Serv. Corp.*, 27 F.3d 911, 917 (3d Cir. 1994). A fruitful analogy may be drawn to the body of case law determining whether "the position of the [United States] was substantially justified" for purposes of fee awards under 28 U.S.C. § 2412(d). *See, e.g., Pierce v. Underwood*, 487 U.S. 552, 564-66 (1988).

- Whether the plaintiff is partly responsible for the removal, for the case's remaining in federal court, or for altering the case after removal to precipitate a remand.[69]
- Whether the defendant failed to notify the court of developments depriving it of jurisdiction[70] or engaged in other inequitable or improper conduct.[71]
- Whether a party is a pro se litigant or lacks the financial ability to bear an award of costs or fees.[72]
- Whether a cost or fee award is fair "overall . . . given the nature of the case, the circumstances of the remand, and the effect on the parties."[73]

[69] *Avitts v. Amoco Prod. Co.*, 111 F.3d 30, 32-33 (5th Cir. 1997); *Baddie v. Berkeley Farms, Inc.*, 64 F.3d 487, 490-91 (9th Cir. 1995); *Bankston v. Burch*, 27 F.3d 164, 169 (5th Cir. 1994); *Miranti*, 3 F.3d at 929; *see also Kunica v. St. Jean Fin., Inc.*, 63 F. Supp. 2d 342, 352 (S.D.N.Y. 1999).

[70] *See Morgan Guar. Trust Co. v. Republic of Palau*, 971 F.2d 917, 924 (2d Cir. 1992).

[71] *See Excell, Inc. v. Sterling Boiler & Mechanical, Inc.*, 106 F.3d 318, 322 (10th Cir. 1997) (defendant refused request to remand, though acknowledging that court would likely order remand); *Elsis*, 581 F. Supp. at 608 (eve-of-trial removal without co-defendants' consent delayed timely litigation of case).

[72] *See, e.g., City of Superior v. Anderson*, 1995 WL 861008 at *2 (D. Minn. 1995) (denying fees against pro se defendant); *see also Topeka Housing Auth.*, 404 F.3d at 1248 (noting that pro se status does not prevent a fee award, but affirming award of only $500, much less than the actual fees plaintiff incurred).

[73] *Morris v. Bridgestone/Firestone, Inc.*, 985 F.2d 238, 240 (6th Cir. 1993); *Morgan Guar. Trust Co.*, 971 F.2d at 924.

III. The District Court Properly Denied Petitioners' Fee Request

The judgment denying petitioners' request for fees should be affirmed under either interpretation of § 1447(c) stated above.

If the section empowers district courts to award fees only when other law permits, petitioners were properly denied fees, as they did not try to show that a fee award was permitted by any law other than § 1447(c). The district court's factual findings preclude any award under Fed. R. Civ. P. 11 or the equitable bad faith, vexatious litigant exception to the American Rule. See Pet. 17a-20a. No other statutory or equitable basis for a fee award appears applicable here.

Alternatively, treating § 1447(c) as a fee-shifting statute, the judgment should be affirmed. Fees were properly denied under a party-neutral, multi-factor test similar to the one suggested above. Addressing the primary factor under that test, both lower courts found that defendants had objectively reasonable grounds for believing removal was proper based on unsettled and developing law.[74] Pet. 7a-13a, 17a-20a.

Proving the same point, the district court concluded that removal was proper and thereafter found there was "no substantial ground for difference of opinion" on that issue. JA 42-43, 46-49. Plaintiffs, themselves, considered the removal proper at the outset, changing their mind only

[74] The lower courts' finding in this case is consistent with *Haisch v. Allstate Ins. Co.*, 942 F. Supp. 1245, 1252 (D. Ariz. 1996) which denied a fee award under § 1447(c) for the same reason: the unsettled state of the law regarding aggregation of punitive damages in a class action to meet the amount in controversy requirement.

when the district court disclosed its intention to rule against them on the merits.[75] JA 38-41.

Even though neither lower court made express findings on other relevant factors, the judgment should be affirmed. Petitioners never suggested any other relevant factor weighed in their favor. Indeed, the only other factor applicable to this case supports denial of fees: Petitioners were partially to blame for the removal, due to their complaint's unclear allegations regarding the amounts they sought and their feigned ignorance of the falsity of their allegation they had paid the collateral protection insurance premium. *See* JA 39; *compare* JA 42-43 *with* JA 59-60. Plaintiffs were also responsible for the case's prolonged sojourn in federal court, having waited a year after removal before first raising any question as to subject matter jurisdiction. *Compare* JA 1 item #1 *with* JA 38.

Reversal would be appropriate in this case *only* if the Court adopted petitioners' erroneous notion that plaintiffs should be awarded fees on remand in almost every case, especially when the defendant advances a novel theory or unsuccessfully attempts to make new law expanding the boundaries of federal removal jurisdiction. *See* Pet. Brief, 17-23.

As already shown, nothing in § 1447(c), its legislative history, its larger objectives, or relevant equitable considerations supports such a standard. Nor do any of the hundreds of published lower court decisions on fee awards

[75] *See Moline Mach., Ltd. v. Pillsbury Co.*, 259 F. Supp. 2d 892, 905-06 (D. Minn. 2003) (fees denied: "the basis for the removal was sufficiently compelling that the Plaintiff did not mount any effort toward remand until late in the pretrial process"); *Heichman v. American Tel. & Tel. Co.*, 943 F. Supp. 1212, 1222 (S.D. Cal. 1995) (fees denied: "plaintiff appeared to accept this Court's jurisdiction for a time and only changed his mind, possibly for strategic reasons").

under § 1447(c). To the contrary, many have expressly rejected petitioners' proposed test, holding that fees should *not* be awarded when the defendant had an objectively reasonable ground for believing that removal was proper – particularly when that belief is based on unsettled, unclear, complex, or developing law on jurisdictional issues.[76]

Adopting petitioners' proposed standard would overturn the settled law of every circuit but the Seventh – each of which has adopted a party-neutral, multi-factor test – and would stultify the law on federal removal jurisdiction, deterring defendants from seeking healthy change or clarification in a complex system of laws Congress enacted for reasons other than simply barring the doors to federal courthouses.[77]

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[76] *Martin*, 393 F.3d at 1151 (denial of fees no abuse of discretion "[g]iven the uncertain state of the law on aggregation of punitive damages"); *Roxbury Condominium Ass'n, Inc.*, 316 F.3d at 228 (fees not awardable when defendant has "colorable removal claim in an area of unsettled law"); *Valdes*, 199 F.3d at 293-94 (state law on viability of claim against non-diverse defendant only clarified by post-removal decision); *Virgin Islands Housing Auth.*, 27 F.3d at 917 (jurisdictional issue clarified only by post-removal decision); *see also* authorities cited at Ans. to Cert. Pet., 10-11, n.18.

[77] However desirable it may seem to make jurisdiction "as self-regulated as breathing," see Pet. Brief, 20, federal jurisdiction is, in fact, a highly complex area, made more so by intricate, complicated jurisdictional grants, such as 28 U.S.C. § 1332(d), and by this Court's refusal to adopt "precise, [and] all-embracing" jurisdictional tests. *See Grable & Sons Metal Prod., Inc.*, 125 S.Ct. at 2368, 2372 (Thomas, J., concurring). The complexities of federal jurisdiction will not vanish if attorney fees are nearly always awarded on remand, nor is there any evidence Congress intended to achieve simplification by that indirect means. Instead, adopting petitioners' proposed standard may deter defendants in the future from removing in cases like *Beneficial Nat. Bank* and *Grable & Sons*, making it more difficult for this Court to chart the contours of federal jurisdiction.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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